

# TOWN OF HERNDON

*Enriching the Quality of Life and Promoting a Sense of Community*



## MEMORANDUM

**To:** Honorable Mayor and Members of Town Council  
Arthur A. Anselene, Town Manager

**From:** Richard B. Kaufman, Town Attorney RBK

**Date:** September 9, 2008

**Re:** Day Workers

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### I. Introduction

I am writing this memorandum to set out legal proposals and recommendations used to provide support to the Mayor and Town Council's discussion in a closed meeting on September 2, 2008.

### II. Facts

These are the facts facing the Town now as to day workers. Every morning, approximately 40-60 day workers line the streets of the intersection of Elden Street and Alabama Drive (the Corridor). This figure has appeared to increase recently. Except for the linear group on Elden Street and Alabama Drive many of the day workers congregate in groups of three to eight people on the streets and even on the private property at the other locations. Other groups of men apparently gather on private property, not to seek work, but to socialize.

Contractors and homeowners drive vehicles to these sites and engage the day workers for daily work, often with subtle and well-understood signals. The transactions usually happen quickly. A security guard at one establishment prevents day worker pick-ups from occurring on that private property. This causes the transaction to be moved to other private property or to the street. Other landowners also hire security guards. Some owners bar day workers from their sites under trespass laws. Others are reluctant to bar anyone whom they deem to be their customers or potential customers. Some contractors engage, through eye contact or signals, a group of day workers, say, at one location. Then the day workers cross Elden Street to be picked up, say, at another retail location. Some workers meet in the Corridor in pre-arranged pick-ups for rides to work. Occasionally day workers use the former ad hoc site on Alabama Drive at Alabama Drive Park but that site has been largely overcome by day workers in the Corridor. The day workers on the street make way for pedestrians and do not inappropriately engage a female pedestrian passing through. The day workers do not block entrances to driveways to businesses. The day workers, it is reported, are careful not to drink alcohol in public, urinate in public, or

engage in other petty offenses, though littering and jaywalking are issues. The day workers appear to have coaches and advisors who also observe the Town police and zoning enforcement activities in the Corridor.

### **III. The Law**

I will here summarize the existing law that governs day workers.

The HPD may and does enforce State law, which is also Town ordinance, prohibiting stopping of a vehicle to impede progress on the highway or blocking access to certain businesses;<sup>1</sup> trespass;<sup>2</sup> and jaywalking.<sup>3</sup>

CD Zoning inspectors enforce ordinances applicable to private property prohibiting the conduct without a special exception of the technically defined “temporary assembly site for day workers.”<sup>4</sup>

Judge Alden said in her opinion on the anti-solicitation ordinance that people, including illegal aliens, enjoy a constitutional right to express themselves on a public street. The Town may not deny or adversely affect that right but may in a content-neutral way address the time, place, and manner of such speech to mitigate its secondary effects.<sup>5</sup> Any Town plan to address the presence of day workers must address and conform to these unalterable constitutional principles.

It is illegal under federal, and under Virginia law (deemed preempted by federal law) for an employer to hire an illegal alien or to hire any employee without compliance with the I-9 identification and work eligibility program.<sup>6</sup> This federal requirement applies to day workers, though it does not apply to employees hired for “casual domestic work in a private home on a sporadic, irregular, or intermittent basis.”<sup>7</sup>

The instructions for the I-9 form state that “[i]f you hire a person for less than 3 business days, ... the Form I-9 must be completed at the time of the hire when the employee begins work.”<sup>8</sup> The U.S. Circuit Court of Appeals for the Ninth Circuit (West Coast) held that a day worker hired with no I-9 form to rebuild a washed-out hill in the employer’s yard was not performing “domestic service in a private home that is ... irregular.”<sup>9</sup> The Court in holding that

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<sup>1</sup> §§ 46.2-818, Code of Virginia (1950), as amended; 42-3, Herndon Town Code (2000), as amended.

<sup>2</sup> § 18.2-119, Va. Code.

<sup>3</sup> § 46.2-923, Va. Code.

<sup>4</sup> §§ 78-403.7(6) and 78-203.2(b)(6), Zoning Ordinance (2007) Herndon Town Code (2000), as amended.

<sup>5</sup> Town of Herndon v. Thomas, August 29, 2007, MI-2007-644 (Cir. Ct. Fairfax County).

<sup>6</sup> 8 USC §274a.2; Form I-9, Employment Eligibility Verification OMB 1614-0047, at 1; § 40.1-11.1, Code of Virginia.

<sup>7</sup> “Handbook for Employers” M-274 at 5 (2007).

<sup>8</sup> ID.

<sup>9</sup> Jenkins v. INS, 108 F.3d 195 (1997).

the I-9 process did adhere to this day labor transaction held that “domestic” work is that “done by tradition and necessity in every household ... by members of that family unit ... chores that are normally carried out by the family members themselves, without formal pay.”<sup>10</sup> Some lawyers disagree with my conclusion and assert that day workers are not covered by the I-9 program.

#### **IV. Legal Recommendations or Legal Proposals**

I will here summarize those legal recommendations or legal proposals I have already made. Then, I will describe in greater detail additional, new legal recommendations, and legal proposals.

(a) **Street encroachment and revised anti-solicitation ordinance.** This recommendation calls for the Mayor and Town Council to designate the unimproved street right-of-way on Alabama Drive, abutting the Alabama Drive Park, as a street encroachment where day workers do congregate. Council would consider adoption of a revised anti-solicitation ordinance and corresponding zoning provisions to clear the way and to overcome Judge Alden’s objections to the anti-solicitation ordinance and corresponding zoning provisions. The Town would enforce the revised anti-solicitation ordinance.

(b) **Ordinance under existing law: Licensing of day workers and employers.** Please see draft ordinance attached. Anyone, including illegal aliens, who complied with the simple application process could obtain a license. Yet, it would force identification of day workers and employers. The Town perhaps could require the I-9 process to be discharged as a condition to the license. Because the draft ordinance would involve a licensing program, it would not be preempted by federal law; and federal law supports denial of a license that is a “local benefit” to illegal aliens, though I am not recommending the Town’s going that far here.<sup>11</sup>

(c) **Bill: Licensing of day workers.** This bill, attached, with other law<sup>12</sup> would authorize the Town to establish a licensing program for day workers and to deny a license to illegal aliens.

(d) **Security guard.** The Town would hire a security guard firm to patrol and prevent private property solicitation or hiring of day workers. The CD staff, HPD, and I agree that the security guard program works. Security guards must have the authority of the private landowners, which I believe would be forthcoming. Security guards as agents of the owner can legally tell people they cannot engage in solicitation of day work on the site. The down sides are that the Town would need to pay for this service. I believe that to eliminate the secondary effects of day workers, the Town would have Dillon Rule authority to take this step. Another down side is the side effect of such a successful program would be to move the day workers to

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<sup>10</sup> ID.

<sup>11</sup> 8 USC 1324(h)(2); 8 USC §1621.

<sup>12</sup> §15.2-1125, Va. Code.

the street or to other private property not benefitted by the security guard program. The Town Manager estimates that to have an effective security guard program the Town would need to have a minimum of two and perhaps four security personnel to manage the various commercial sites and with the consent of the property owners. The estimated cost could range from \$200 to \$400 per day with a weekly cost of \$1,400 to \$3,000 per week.

(e) **I-9.** The I-9 program serves as the only direct legal basis to stop the hiring of those day workers who are illegal aliens. As an alternative to federal enforcement action, I can offer two legal proposals. First, the Town may engage in a public relations and signage campaign to advise using language from the federal I-9 program that the hiring of anyone without undergoing the I-9 program is illegal. (This signage campaign could operate independently of the I-9 proposal. I recommend that the Mayor and Town Council discuss authorization of the Town Manager to institute such a signage program.) Second, and cumulative to the first suggestion, the Town to the extent the Town can work with the United States Immigration and Customs Enforcement (ICE) to enforce the I-9 program here, the Town should invoke the I-9 program in the Town's day workers context as allowed by federal law. Federal law in this regard provides that:

Any person ... having knowledge of a violation or potential violation of [the I-9 requirements] ... may submit a signed, written complaint in person or by mail to the [ICE] ... office having jurisdiction over the business or residence of the potential violator. The signed written complaint must contain sufficient information to identify both the complainant and the potential violator, including their names and addresses. The complaint should also contain detailed factual allegations relating to the potential violation including the date, time, and place of the alleged violation and the specific act or conduct alleges to constitute a violation of the [Immigration and Nationality] Act. The written complaints may be delivered either by mail to the appropriate [ICE] ... office or by personally appearing before any immigration officer at an [ICE] ... office.<sup>13</sup>

ICE then is supposed to undergo an investigation and enforcement process. The Town would effectuate this plan with the following methods. The Town would hire a private detective to observe the I-9 violations and to gain sufficient facts to report them to ICE. (For day work, I-9 paperwork needs to be completed at the time of hire). On behalf of the Town, I would file the complaints with ICE (or the appropriate DHS agency) and prosecute them before that agency. If ICE indicated that it lacked resources to adjudicate these complaints, the Town should invoke its support in the federal executive and legislative branches to achieve this goal. The Town would in all cases use the language from the federal I-9 program to operate this program. All Town efforts would comply with the federal I-9 program as described in federal statute, regulations, or handbooks. The private detective through skillful, lawful means would be ascertaining facts to

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<sup>13</sup> 8 USC §274a.9(a).

enable the Town to help ICE enforce the I-9 program. This enforcement if it materializes should eliminate the secondary effects of the ad hoc day worker sites in the Town.

(f) **Use of public street for private purpose.** The people of Virginia through the Constitution and the General Assembly by statute prohibit occupancy or use of a street in a manner not permitted to the general public, without having first legally obtained the consent of the ... town and criminalize such occupancy or use as a misdemeanor.<sup>14</sup> While Judge Alden held that individuals may enjoy the constitutional right to solicit work or solicit to hire workers in the public street, these constitutional and statutory provisions do not allow a group of people to use the street in the Corridor as a day worker assembly site, especially one that lacks zoning approval. The Town could discover the identity of the persons conducting this use, or one of them, and seek an injunction against that person or persons for violation of the law.

(g) **Alternate site for legal workers.** The Town Council could establish by proper measure a site for day workers to solicit work in the street, provided those day workers were lawfully present and authorized to work, in the United States. This fact would be determined by a licensing program, or I-9 requirement enforcement.<sup>15</sup> Any other day workers of employers could still as individuals solicit work of workers on other streets, subject to the normal enforcement of zoning and traffic safety, and other federal or Virginia laws. The Town would engage in a public information campaign to publicize the day worker assembly site for workers who legally may work in the United States, urge employers to use the Town's site, and urge employers not to violate federal, Virginia, and Town law by hiring workers outside of the Town's site. The Town would not use the anti-solicitation ordinance under the plan because Judge Alden held that all persons enjoy as individuals the constitutional right to solicit work or workers on public streets.

(h) **Public nuisance.** The Town Council by ordinance "may compel the abatement or removal of all nuisances."<sup>16</sup> Any group of five or more citizens of the Town may file a complaint in the Fairfax County Circuit Court "setting forth the existence of a public or common nuisance ...." The Court will summons a special grand jury which will "specifically investigate such complaint." The grand jury can issue a "presentment" or process against the person or premises responsible for the public nuisance. The court can fine the responsible party up to \$10,000 and order the removal of the public nuisance.<sup>17</sup> I believe that the Town with the efforts of the Town Attorney could bring such a proceeding "ex relatione," or "upon relation of information," of the five or more citizens.<sup>18</sup> I would have to verify this position from a legal standpoint.

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<sup>14</sup> Art. VII §8, Constitution of Virginia (1971), as amended; 15.2-2107, Va. Code.

<sup>15</sup> § 15.2-2013, 15.2-2107, or 15.2-2009, Va. Code.

<sup>16</sup> §§ 15.2-900 and 15.2-1115, Va. Code.

<sup>17</sup> §§ 48-1 through 48-6, Va. Code.

<sup>18</sup> Black's Law Dictionary, definition of "ex relatione" at 663 (1968).

A public nuisance is a condition that affects the public generally with a substantial injury, annoyance, or discomfort to the public.<sup>19</sup> Blocking a public road or allowing a hidden pit to exist on public land could be public nuisances, for example.

The drawback with the public nuisance theory is that there is no definite defendant or responsible person and no certain land as the locus of the public nuisance.

(i) **Street vacation.** A Town Council member has suggested vacation of the street area where day workers congregate to expand the scope of the zoning restrictions. This plan would eliminate Town control of major public facilities and move the day workers to other public streets.

### **V. Recommendations**

The Mayor and Town Council should not as a first option pass the day worker licensing ordinance (except in the context of the alternative site for legal workers recommendation) and should not as a first option pursue the bill on licensing of day workers to prevent illegal aliens from obtaining a license.

The Mayor and Town Council should pursue the hiring of the security guard for the Corridor.

The Mayor and Town Council should also pursue either the (i) street encroachment and revised anti-solicitation ordinance or the (ii) I-9 proposals, but not both. As I wrote in my confidential memorandum of September 26, 2007 (which except as provided below the Mayor and Town Council are not waiving the attorney-client privilege as to) that:

“The best way to accomplish these ends would be to establish or have a third party establish a formal, unstaffed day worker assembly site open to all, with a redrafted, strengthened anti-solicitation ordinance. If this course is not acceptable to the Mayor and Town Council, and if there exists discomfort with the current informal site and if the Mayor and Town Council were prepared to allocate substantial resources to this matter, the Town could file a civil action for a declaratory judgment to ask the Circuit Court to decide whether the Town may legally enforce its zoning, street use, and BPOL ordinances in view of the facts, the local and Virginia laws, and in view of the countervailing free speech rights that will be alleged.

A declaratory judgment proceeding is designed to allow a party faced with a real legal controversy to seek a judicial ruling on the rights of the parties in the controversy. If successful the Town could seek an injunction against zoning, taxation, or street violations as part of this same proceeding. A declaratory judgment proceeding allows the Town to seize the initiative to

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<sup>19</sup> Virginia Beach v. Murphy, 239 Va. 353, 355 (1990); 6A McQuillin, Municipal Corporations, §24.58, (1997).

enforce its and the Commonwealth's laws, to seek a judicial resolution in a less draconian and less risky manner, and hopefully to prevail."

The Mayor and a majority of the Town Council may find contrary to announced proposals by some local legislators in the pursuit of the street encroachment option. My recommendation is for the Mayor and Town Council to pursue the I-9 publicity and complaint proposals, though I have not yet had the opportunity to talk to ICE about the practicality of this program.

The Mayor and Town Council should pursue the proposal to establish a site for workers authorized to work in the United States while not objecting to continued presence of any day workers or employers as individuals who proposed to solicit work or workers legally on the public street.

The Mayor and Town Council should enforce by injunction against employers who engage in collective and significant day worker hiring activities on public streets without the Town's consent.

The Mayor and Town Council should by ordinance declare the uncontrolled day workers use of the street a public nuisance, or support any such citizen complaint, if facts develop to support that course of action.

The Mayor and Town Council should not pursue the street vacation proposal.

attachments

Draft Licensing Ordinance  
Draft Licensing Bill

RBK/cmh

w/copy of attachments

- c. Toussaint E. Summers, Jr., Col., Chief of Police  
Elizabeth M. Gilleran, Director of Community Development  
Anne P. Curtis, Public Information Officer  
William R. Edmonston, Senior Community Inspector  
Viki L. Wellershaus, Town Clerk

# TOWN OF HERNDON, VIRGINIA

## Ordinance

\_\_\_\_\_, 2008

**Ordinance - Amending Herndon Town Code (2000), as amended to provide a licensing program for day workers and those who hire them.**

### *RECITALS*

Section 15.2-1113, Code of Virginia (1950), as amended authorizes the Town Council to “regulate and prohibit the conduct of any dangerous, offensive, or unhealthful business, trade or employment.”

Section 15.2-2009, Virginia Code authorizes the Town Council to allow street encroachments under conditions prescribed by the Town.

Section 15.2-1125, Virginia Code authorizes the Town Council to “provide for the issuances of license or permits” in the “exercise of any of its powers or in the enforcement of any ordinance ... .”

The Town Council exercises such powers in the regulation of peddlers, solicitors, and street openings among others.

The Town Council finds that unregulated and attenuated gatherings of day workers on or adjacent to public streets constitutes a dangerous and offensive street encroachment, meriting local governmental regulation as to its time, place, and manner.

This finding is based on Town Council receipt from citizens, Town staff, and witnesses at the public hearing on this ordinance of evidence of traffic safety concerns, motor vehicular dangers, dangers to pedestrians, inconvenience to citizens from blocked sidewalks, and offense to some local citizens from unregulated gathering of day workers.

In a representative democracy such as the Town of Herndon, it is appropriate and necessary that elected officials within statutory and constitutional guidelines to respond to the demands and needs of the citizens.

The Town Council intends to protect day workers from employment fraud, wage and hour violations, theft, or violence.

The Town Council intends to the extent that it can to protect employers of day workers from violations of federal and State law governing the employment of employees and from



violations of consumer protection safeguards.

**BE IT ORDAINED** by the Council for the Town of Herndon that:

1. Article III, Peddlers, Solicitors, Canvassers of Chapter 14, Businesses, of the Herndon Town Code (2000), as amended is amended and reordained by the addition of the following sections:

**Article III. Peddlers, Solicitors, Canvassers, and Day Workers.**

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**Sec. 14-68. Day Workers.**

- (a) No one shall hire or seek to hire as an employer a day worker without having first obtained a license for this purpose from the town.
- (b) No one shall seek or accept day work as a day worker without having first obtained a license for this purpose from the town.
- (c) Such licenses may be sought from the office of the Town Manager. The application for the license shall include a photo-identification card or drivers' license issued by a governmental entity, for the day worker and one principal of a business entity, business name, registered office if possible, business address, nationality, eligibility to work in the United States, date of birth, place of birth, and age. The application may contain such other elements or form as the Town Manager may require. The purpose of the application is not to prohibit day worker solicitation of work, but to identify employers and day workers, and to educate employers and day workers so they will be in a position to comply with federal, State, and local laws governing employment. the application form, which the town manager must generate, shall inform employers and day workers as to these laws.
- (d) The Town Manager must act on the application within two business days of receipt. An approved application is valid for a three year term absent change of circumstances. A change of circumstances shall require submission of a new application.
- (e) The application fee shall be \$1.00 per application.
- (f) In case of denial of an application the employer or day worker may demand and participate in a hearing before the Town Manager, requested and held within three business days of the denial decision. At the hearing, the applicant and the Town may present evidence, and witnesses, cross examine the other parties' witnesses, and be represented by counsel. At the hearing, the applicant may present the applicant's side of the matter. The Town Manager must render a written decision within two business days following the hearing. The Town Manager's decision is final and the applicant

may seek whatever judicial relief may be available in the Circuit Court of Fairfax County or other appropriate court.

- (g) These principles govern the solicitation of work or attempt to hire day workers on or adjacent to public street.

    - (i) No one shall obstruct the free passage on the public streets, including sidewalks and unimproved right-of-ways.
    - (ii) No one shall violate any traffic, parking, or motor vehicular law or ordinance.
    - (iii) Those applicants denied a license may solicit day work or seek to hire day workers at any private location zoned for temporary employment agency use.
  - (h) These definitions control the use of this section:

    - (i) Day worker means an individual who seeks or accepts intermittent, temporary tasks or services or labor for wages or any other thing of value on or adjacent to public streets, to be performed offsite from the location of the hiring or attempted hiring.
    - (ii) Employer means an individual or entity, who or which engages the services or labor of an employee for wages or other thing of value.
  - (i) Violation of any provision of this section shall constitute a class 4 misdemeanor and upon conviction shall be punished by a fine of not more than \$250.
2. This ordinance shall be effective on and after the date of its adoption.

HOUSE BILL NO. \_\_\_\_\_

Patron: \_\_\_\_\_

A BILL to amend the Virginia Code to authorize municipal corporations to regulate temporary hiring.

Be it enacted by the General Assembly of Virginia:

1. That § 15.2-1113, **Dangerous, etc., business or employment; transportation of offensive substances; explosive or inflammable substances; fireworks** Code of Virginia (1950), as amended is amended and reenacted as follows:

15.2-1113. Dangerous, etc., business or employment; transportation of offensive substances; explosive or inflammable substances; fireworks; day workers.

(a) A municipal corporation may regulate or prohibit the conduct of any dangerous, offensive or unhealthful business, trade or employment; the gathering, offer of employment, or hiring of day workers, or those person(s) who hire or seek to hire day workers, the transportation of any offensive substance; the manufacture, storage, transportation, possession and use of any explosive or inflammable substance; and the use and exhibition of fireworks and the discharge of firearms. A municipal corporation may also require the maintenance of safety devices on storage equipment for such substances or items.

(b) Any municipal corporation that regulates or prohibits the discharge of firearms shall provide an exemption for the killing of deer pursuant to § 29.1-529. Such exemption shall apply on land of at least five acres that is zoned for agricultural use.

(c) A municipal corporation may require that the hiring of day workers complies with federal law and with laws of this Commonwealth.

(d) A day worker is an individual who seeks or accepts intermittent or temporary work for money or other thing of value.